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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

CROWN CAN COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 552

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF FOR PETITIONER.

W. R. MAYNE,
N. W. HARTMAN,
Counsel for Petitioner.

Of Counsel:
FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
506 Olive Street,
St. Louis, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

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CROWN CAN COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of Crown Can Company for writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court the case of National Labor Relations Board, Petitioner, v. Crown Can Company, Respondent.

The said petitioner respectfully shows to the Court as follows:

I.

That this proceeding determines finally for the petitioner, Crown Can Company, the charges of unfair labor practice as determined by the National Labor Relations Board, even though there was no substantial evidence supporting the Board's findings. In fact, it is shown in

the transcript of record in appendix in support of brief of Crown Can Company, respondent, record page 19, page 20, page 23, page 24, page 25, page 26, that it is the contention of this petitioner that the United States Circuit Court of Appeals for the Eighth Circuit, in its decision, did not give due consideration to the rule which has been previously laid down as to the meaning of the substantial evidence rule as applicable to proceedings had before the National Labor Relations Board.

II.

That petitioner, in the operation of its plant at Nebraska City, Nebraska, is not required to bargain with any representative of any appropriate bargaining unit until the representative of such unit presents convincing proof of such majority support. The facts in the present case showed that a representative of the Union wrote the manager (Superintendent of the Crown Can Company plant at Nebraska City) for a conference; that such letter was sent by registered mail, that it was received by the superintendent, and the record further shows that there was no reply made to such letter. The superintendent who received this letter was transferred to the Company's Orlando, Florida, plant and turned the letter over to his successor at Nebraska City and more than a month elapsed before such successor superintendent turned over the letter in question to the management of the Company at its home office in Philadelphia. Before the home office had any opportunity to contact the labor organizer, charges had already been filed before the National Labor Relations Board charging this Company with violation of Sections 8 (1), (3) and (5) and Sections 2 (6) and (7) of the National Labor Relations Act. The record further shows that the labor organizer who sent the letter to the plant superintendent never called on anyone in connection with the Crown Can Company for the purpose

of bargaining nor did anyone else connected with the Union. It is the Company's contention that the failure of the superintendent to reply immediately to the letter sent by the labor organizer could under no circumstances be a violation of the National Labor Relations Act on the question of refusal to bargain. It is further the contention of this petitioner that there is no substantial evidence supporting the Board's petition for enforcement, but that there is no evidence in the record wherein the United States Circuit Court of Appeals for the Eighth Circuit concluded in its opinion that this petitioner was guilty of the charge relating to refusal to bargain.

III.

The Crown Can Company is a Pennsylvania corporation which operates a plant in Nebraska City, Nebraska, and is there engaged in the manufacture, sale and distribution of cans. At the time of the trial of the cause, there were eight or nine employees of the Company. The unfair labor practices charged in the complaint are that on or about November 30, 1940, the Company, by its officers, agents and employees, terminated the employment of Gordon Armstrong, Ralph Nelson and Henry Jens, because of their activity in behalf of the Union, and that on or about December 7, 1940, the Company, by its officers, agents and employees, terminated the employment of Cecil Hasty because of his membership and activity in behalf of the Union, and that since such aforementioned dates the Company has failed and refused to reinstate said employees. The further unfair labor practice alleged in the complaint is that the Company since October 14, 1940, refused and still refuses to bargain collectively with the Union as a representative of the employees in the unit made up of all production and maintenance employees in the Nebraska City, Nebraska, plant of the Crown Can Company. The complaint further alleged that the repre-

sentatives of the Company questioned employees about union membership, made prejudicial remarks to and about individual union members, threatened to close the plant if employees continued membership in the union and tried to induce employees through promises of wage increases not to join or continue their membership in the Union. Hearing was had in this cause in Nebraska City, Nebraska, beginning on March 24, 1942, and after all parties had had an opportunity to present testimony, the trial examiner found that the Company was guilty of discharging Gordon Armstrong without just cause and ordered him to be taken back and made whole. The other three men, Ralph Nelson, Henry Jens and Cecil Hasty, were not ordered to be returned to the employ of the Company nor was the Company ordered to pay back wages for these three discharged employees. The Board affirmed the trial examiner's report and the decision of the United States Circuit Court of Appeals on petition for enforcement of an order of the National Labor Relations Board, approved the previous findings and decision of the trial examiner and the Board. As this Court can well realize, since there was a small number of employees working for the Company at this plant, all of the employees at the time of the hearing were put on the witness stand and all of said employees, eight or nine in number, testified that the Company or any of the management in a suvervisory capacity, were not guilty of any of the charges as alleged in the complaint. Such testimony was completely ignored by the administrative body as well as the United States Circuit Court of Appeals for the Eighth Circuit in that this Court held that there was substantial evidence supporting the findings of the Board. In so stating in its opinion, the United States Circuit Court of Appeals for the Eighth Circuit must have determined and found that the testimony of these eight or nine witnesses which were all of the employees of the Company, did not come under

the category of substantial evidence, but that one witness by name of Gordon Armstrong, who testified for the Board and was contradicted by all of the witnesses who testified for the Company, gave the only substantial testimony. In fact, the trial examiner and the Board and the United States Circuit Court of Appeals for the Eighth Circuit went so far in stating that they could not believe the testimony of the eight or nine witnesses but that the one witness by the name of Gordon Armstrong was the one to believe and therefore such evidence was substantial and supported the findings of the National Labor Relations Board. It is the contention of this petitioner in this cause, the Crown Can Company, that the United States Circuit Court of Appeals for the Eighth Circuit never gave proper and due consideration to what is substantial evidence as applied to a petition for an order of enforcement of the National Labor Relations Board. As to the other contention which this petitioner makes, that the United States Circuit Court of Appeals was in error by finding the Crown Can Company remiss in its duty to bargain collectively, the Company feels that not only is such finding not supported by convincing evidence of majority support, but that the United States Circuit Court of Appeals for the Eighth Circuit has applied one of its decisions in a related case which case is not in point on all fours. The case that is referred to is the case of National Labor Relations Board v. William Tehel Bottling Company, 129 Fed. (2d) 250. In fact the United States Circuit Court of Appeals in the present case admitted in its opinion "that an employer may request reasonable proof that the union represents a majority of the employees and in the absence of such proof he need not bargain if he in good faith doubts the union majority." In the present case there was no proof ever submitted by anyone connected with any union organization that they represented a majority, and under those facts it is the

contention of the Company that the Union has failed to present convincing proof that it represents a majority and therefore the Company is under no duty under any provision of the National Labor Relations Act to bargain.

All of said questions were duly raised and argued by counsel for your petitioner in the Circuit Court of Appeals.

IV.

Your petitioner respectfully submits that a writ of certiorari should be allowed herein for the following two reasons:

1. Because the United States Court of Appeals for the Eighth Circuit has failed to properly interpret the meaning of the term "substantial evidence" as defined by this Court in its application to hearings and decisions under the National Labor Relations Act.

2. Because the Court has erred and been misled in its own interpretation of a previous decision in the case of National Labor Relations Board v. William Tehel Bottling Company, 129 Fed. (2d) 250, and the application of such decision to the present case wherein a labor union would not be required to furnish any proof that it represents a majority before an employer would have to bargain with such representative.

Because the petitioner feels aggrieved by the decision of said Circuit Court of Appeals for the Eighth Circuit in the matters and things aforesaid, your petitioner respectfully prays that a writ of certiorari be issued out of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings had in said Circuit Court in the cause entitled National Labor Relations Board, Petitioner, v. Crown Can

Company, Respondent, No. 12,547, September Term, A. D. 1943, and to the end that said cause may be reviewed and determined by this Court and the judgment of said Circuit Court of Appeals be reversed and for such proceedings therein as to this honorable Court may seem just and proper.

CROWN CAN COMPANY,

W. R. MAYNE,
N. W. HARTMAN,
Counsel for Petitioner.

Of Counsel:

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
506 Olive St., St. Louis, Mo.

State of Missouri, }
City of St. Louis. } ss.

N. W. Hartman, being duly sworn, says that he is one of the counsel for the petitioner in the foregoing petition for writ of certiorari and that he has read the foregoing petition and the same is true to his own knowledge; that his knowledge is derived from the records of this case and that the case is one in which the prayer of the petitioner should be granted by this honorable Court.

N. W. Hartman.

Subscribed and sworn to before me this 15th day of December, A. D. 1943.

Marie Lang,
Notary Public.

(Seal)

My commission expires November 25, 1947.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

CROWN CAN COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. .....

BRIEF OF PETITIONER.

A concise statement of the facts and issues is set forth in the petition for writ of certiorari, to which the Court is respectfully referred in order that we may avoid needless repetition.

In the instant case, the decline in membership in the proposed union was not due to the refusal of the employer or Company to bargain with the union as representative of the employees in the manner contemplated by the National Labor Relations Act, but such decline was due to the fact as shown by all of the witnesses of the Company in the present case who stated that they could not derive any benefit from the union. Such witnesses further stated that as a result thereof they did not desire to have any connection with the union nor did they want to have the union represent them in any way. In spite of this an order was entered by the National Labor Relations Board to the contrary, and which order was approved by the United States Circuit Court of Appeals for the Eighth Circuit in

the petition for enforcement, which said order and decision deprives the employees of the Company from any rights guaranteed them under the constitution to even think or express thoughts as to their desires concerning union organization and representation.

Petitioner herein contends that the United States Circuit Court of Appeals for the Eighth Circuit has erred in granting the petition for enforcement found by the National Labor Relations Board, in that there is no substantial evidence in the record to support the conclusions which the Board arrived at. In support of such contention, the Company desires to call this Court's attention to the case of Bussman Mfg. Co. v. National Labor Relations Board, 111 Fed. (2d) 783, l. c. 787, wherein the Court said:

> "When the testimony shows, as it does here, that the cause of the discharge may have been one of two things, one of which was illegal and the other legal, the fact-finding tribunal cannot guess between the two causes and find that union activities was the real cause when there is no satisfactory foundation in the testimony to support the conclusion. Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361. When evidence is consistent with either of two inconsistent hypotheses it establishes neither. Stevens v. The White City, 285 U. S. 195, 204, 52 S. Ct. 347, 76 L. Ed. 699; New York C. R. Co. v. Ambrose, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562. Under these circumstances, had the case been tried by a jury, it would have been the duty of the trial judge to direct a verdict for the defendant Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; Massachusetts Protective Ass'n v. Mouber, 8 Cir., 110 F. (2nd) 203, 206. Proof of mere sequence is not sufficient to establish consequence or causal sequence. A post hoc ergo propter hoc is sound neither in logic nor in law. Had there been evidence that the employer sometimes or often had discharged employees for union activities, or had there been other substan-

tial evidence to show that it was highly probable that the discharge was the result of union activities, the Board's conclusion could be sustained. Wigmore, Principles of Judicial Proof, p. 20, Sec. 4 (a). But no such probative circumstances are in evidence."

"In relation to what is substantial evidence, we call the Court's attention to an opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the case of Wilson & Co., Inc., v. National Labor Relations Board, 126 Fed. (2d) 114, l. c. 116:

> 'We have conceived it to be our duty to study the evidence in these labor cases for the purpose of ascertaining the existence or absence of substantial proof to support the findings of the Board. In making this study, we have sifted the evidence and endeavored to analyze it as we do in the ordinary civil suits, for the sole purpose of ascertaining the existence of substantial evidence to support the Board's findings.
>
> 'We have recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce. We must confess that at times we have apparently failed to recognize that evidence which would not appeal to any normal, rational appraiser of the truth, may yet fall within the field of "some evidence." On the assumption that such evidence would not be sufficient to sustain a finding in an ordinary civil suit, we have rejected it. We have at times set aside the findings of the Board, but only for the same reason that we have set aside findings of fact by the trial court and by special masters, or referees in bankruptcy, to wit, when the findings were so overwhelmingly opposed by the evidence as to require it.'

"In view of such ruling of the courts the Company is fully convinced that there is no substantial evi-

dence in this case to support the findings and order of the National Labor Relations Board. The provisions of Section 10 (e) of the National Labor Relations Act that the findings of the Board as to facts, if supported by evidence, shall be conclusive, means that there must be evidence supporting a substantial basis of fact from which the fact in issue can be reasonably inferred, which must be more than a scintilla and must do more than create a suspicion of the existence of the fact to be established, and must be such relevant evidence as a reasonable man might accept as adequate to support the conclusion and enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

"The United States Supreme Court, in the case of National Labor Relations Board v. Columbian Enameling and Stamping Co., Inc., 306 U. S. 292, 83 L. Ed. 660, held:

> 'But, as has often been pointed out, this (facts supported by evidence), as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Citing Washington V. & M. Coach Co. v. N. L. R. B., 301 U. S. 142, 81 L. ed. 965; Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. ed. 126; Appalachian Elec. Power Co. v. N. L. R. B., 93 Fed. (2d) 985, 989; National Labor Relations Board v. Thompson Products, 97 Fed. (2d) 13; Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 Fed. (2d) 758, 764.'

"In the Appalachian Elec. Power Co. case, supra, it was held that:

> 'What is substantial evidence in such case is not difficult to define in general terms. It is such evidence as in the mind of a reasonable man would support the conclusion of the Board. No mere

rule of thumb, however, will suffice to solve the difficulty in most cases. It will not do, as counsel for the Board suggests, to show in every case that union membership must be deemed the cause of the discharge if a Board is of the opinion that the employee would not have been discharged for the cause assigned if he had not been a union member. If a good cause for dismissal exists and if it appears that the employee was discharged in good faith for that reason, it is idle to speculate what might have been the employer's attitude if the employee had not been a member of the union.'

* * * * * * *

'Our function is limited to showing whether the conclusion reached is supported by any substantial evidence in the record.' ''

Crown Can Company, petitioner herein, feels that there is no evidence in this case—not even a scintilla of evidence—that the labor union or its representative represented a majority of employees of the Company in an appropriate bargaining unit, nor was there any information supplied the Company as to what might be an appropriate bargaining unit. In the case of National Labor Relations Board v. Dahlstrom Metallic Door Co., 112 Fed. (2d) 756, it was held that an employer is under duty to bargain as soon as the union representative presents convincing evidence of a majority support, and cites the case of National Labor Relations Board v. Remington Rand, 94 Fed. (2d) 862, 868, certiorari denied 304 U. S. 576, 82 L. Ed. 154. In the last mentioned case the Court stated as follows:

"We do not mean that respondent had to bargain with anyone claiming to represent a majority, but adequate proof tendered by a claimant cannot in good faith be ignored. The union offered to submit signed membership cards, but its offer was not accepted."

Applying this rule in the above case to the facts in the case at bar, we call the Court's attention to the fact that the union representative in the present case never presented any convincing evidence; in fact, presented no evidence whatsoever, and the union representative who testified at the hearing stated that he never called on the representative of the Crown Can Company at Nebraska City, Nebraska, for the purposes of bargaining. Such union representative further testified that he did not know either one of the superintendents in charge of the plant since it started its operations in the summer of 1940. In view of this testimony and applying the rule laid down in the Dahlstrom case (supra) and the Remington Rand case (supra), it is difficult for this petitioner to understand how the National Labor Relations Board can ignore its own witness' testimony and arrive at conclusions which are not supported by any evidence in the record.

As to the question of refusal to bargain, the United States Circuit Court of Appeals for the Eighth Circuit in its opinion admitted "that an employer may request reasonable proof that the union represents a majority of the employees and in the absence of such proof he need not bargain if he in good faith doubts the union's majority." Such language was predicated upon the decision of the United States Circuit Court of Appeals for the Eighth Circuit in an earlier case of National Labor Relations Board v. William Tehel Bottling Co., 129 Fed. (2d) 250, which case upheld the earlier case of National Labor Relations Board v. Somerset Shoe Co., 111 Fed. (2d) 681. The United States Circuit Court of Appeals in the present case said that because the superintendent of the plant of petitioner failed to answer the letter sent by the union representative to him the previous rule as set out above did not apply. The decision of the United States Circuit Court of Appeals in the present case means that if a

superintendent of a company does not promptly answer a letter sent to him by a labor organizer, then such company stands convicted of a charge of refusal to bargain. The testimony in the present case further showed that the petitioner in two other areas (Philadelphia, Pennsylvania, and St. Louis, Missouri) had bargained with this same union and had entered into contracts with such organization.

Since the authority or status of a union duly designated or selected as a bargaining agent is created by and owes its existence to the consent of a majority of the employees in an appropriate bargaining unit, it must as a general proposition be terminated by expressed revocation of such authority by a majority of the employees. International Assn. B. S. O. I. W. v. Pauly Jail Building Co., 118 Fed. (2d) 615, 314 U. S. 639, 86 L. Ed. 513.

The contention of the petitioner in the present case is that the United States Circuit Court of Appeals has overlooked the fact that all of the employees of this Company, eight in number, testified at the time of the hearing that they were not desirous of belonging to this union nor were they desirous of having the union represent them as a bargaining agent. This can mean only one thing, and that is that there has been an expressed revocation by such employees of their desire that the union represent them as a bargaining agent. The right secured to all employees by the National Labor Relations Act to form their union included the right to revoke the designation of a national union as their bargaining agent. It is difficult for this petitioner to understand how it could endeavor to negotiate with a bargaining agent if all of its employees have expressed a desire under oath not to have the union bargain for them. In view of such facts, one can arrive at only one conclusion, and that is that the employees have revoked the agency given to the union representative for bargaining purposes.

It has been repeatedly held as a general proposition that if the union at any time ceases to represent the majority of the employees in an appropriate unit, it loses its power to bargain for the unit. National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L. Ed. 627; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 84 L. Ed. 799; National Labor Relations Board v. P. Lorillard Co., 117 Fed. (2d) 921, 314 U. S. 512, 86 L. Ed. 380.

Upon the facts disclosed by the record and the authority of the cases hereinabove cited, it is unbelievable that petitioner herein should not have its rights reviewed and proper decision made. We earnestly believe that the matters involved are of such moment to this petitioner and in view of its past record concerning labor negotiations, that this cause should be reviewed and determined by this Court and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

W. R. MAYNE,
N. W. HARTMAN,
Counsel for Petitioner.

Of Counsel:

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
506 Olive Street,
St. Louis, Missouri.

No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1950

CROWN CAFE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 552

CROWN CAN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 16–24)[1] is reported at 238 F. (2d) 263. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 58–73) are reported at 42 N. L. R. B. 1160.

[1] The printed record for purposes of the petition for a writ of certiorari consists of the printed "transcript of record" in the court below, referred to herein by the designation of "R."; the appendices filed by the petitioner and the Board in the court below, referred to herein by the designations "P. A." and "B. A.," respectively; and the printed proceedings in the court below, referred to herein by the designation "S. R."

JURISDICTION

The decree of the court below (S. R. 35–37) was entered November 22, 1943. The petition for a writ of certiorari was filed December 20, 1943. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioner engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act are supported by substantial evidence.

2. Whether, upon finding that employees who testified they no longer desired the union to represent them were motivated by fear of petitioner's antiunion threats, the Board acted properly in disregarding such defections for the purpose of determining whether the union had been designated by a majority of the employees, in holding that the union still remained the designated representative, and in ordering petitioner to bargain with it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

Upon the usual proceedings, the Board, on July 31, 1942, issued its findings of fact, conclusions of law, and order (R. 58–73). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

In October 1940, two employees at petitioner's Nebraska City plant, Armstrong and Braye, on behalf of some of their fellow workers, undertook to form a local of the American Federation of Labor (R. 59; B. A. 6, 14). By October 7, 1940, 11 of the 13 employees in an appropriate bargaining unit had signed a petition appointing the American Federation of Labor their bargaining agent for 1 year and requesting the issuance of a union charter (R. 59–60; B. A. 42). The charter was in fact issued about a week later (R. 59; B. A. 6, 17).

On October 14, 1940, the union representative sent a letter by registered mail to the superintendent of petitioner's Nebraska City plant, informing petitioner that a majority of the employees had designated the Union as their bargaining agent (R. 61–62; B. A. 5, 43). The letter asked whether petitioner would recognize the Union and stressed the Union's desire for a bar-

[2] In the following statement, references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

gaining conference "at the earliest mutually agreeable date," suggesting that petitioner set a conference date "by return mail" (*ibid.*). Petitioner never answered this letter (R. 62; B. A. 6, 35).

On October 16, after receiving the Union's letter, the superintendent called the employees together for a conference in his office (R. 62–65; B. A. 17, 30, 37). When the men had assembled the superintendent reproached them for having joined the Union, saying: "I don't know what I ever done for you guys to do a thing like this to me" (R. 63–64; B. A. 18, 36–37, 38). He urged the employees to tell him what they had "against him" (R. 63; B. A. 18), and asked Braye and Armstrong what he had done to them that caused them to join the Union (R. 63; B. A. 18, 36–37, 38). Both men assured the superintendent they had nothing against him personally but admitted that they had helped to organize the Union (R. 63; B. A. 18). On hearing this, the superintendent said, "If you boys insist on pushing this organization" the plant "will fold up," since the Nebraska City plant was "just a drop in the bucket" in relation to petitioner's other plants (R. 63; B. A. 18, 30, 40). Before the meeting ended, the superintendent said to the assembled employees: "If it is a wage increase you want, I will see what I can do about it" (R. 64; B. A. 18,

37). Four days later, a general wage increase was put into effect (R. 65; B. A. 18, 37).

The Board concluded that by ignoring the Union's request for recognition and by engaging in antiunion conduct clearly indicative of a disposition not to recognize and deal with the Union, petitioner had failed in its duty to bargain collectively with the Union, thereby violating Section 8 (5) and (1) of the Act (R. 67); further, that by its superintendent's statements and conduct at the meeting of October 16, 1940, petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 67).

Gordon Armstrong was hired by petitioner in April 1940 as a "forker" (R. 67; B. A. 12)[3] and was one of petitioner's three oldest employees (R. 68; B. A. 34). He was the leader in the movement to organize the Union, having suggested its formation and solicited his fellow workers to sign the petition designating the Union as their bargaining agent (R. 59, 68; B. A. 15, 13, 29). Armstrong's union sympathies came sharply to petitioner's notice on October 16, 1940, when he admitted to the superintendent his role in organizing the Union (R. 63;

[3] The duties of a "forker" are to remove cans from a conveyor belt and place them in storage bins (R. 67; B. A. 34–35).

B. A. 18), an admission which evoked the superintendent's warning that the plant would be shut down if the employees persisted in "pushing" the Union (R. 63; B. A. 18, 30).

Armstrong was laid off on November 30, 1940, allegedly for a "week or so" (R. 67–68; B. A. 21). Two forkers who were not union members and were junior in point of service were retained (R. 68; B. A. 23). Petitioner contended that Armstrong was laid off because he was the least efficient of petitioner's employees. This contention was clearly untrue, not only because his work had been commended (R. 68; B. A. 20) but also because petitioner's employment record rated Armstrong "good" both as to "skill" and "production" (R. 68; B. A. 41). Petitioner's explanation for its failure to reinstate Armstrong, moreover, was groundless and not the motivating cause (R. 68–69; B. A. 13, 27). The real reason for petitioner's refusal to reinstate Armstrong was petitioner's "fear that he would continue his union activities among its employees" if reemployed (R. 69).

The Board concluded that by the foregoing acts petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 71).

During the hearing five of the eleven employees[4] who had joined the Union testified that they no

[4] Another one of these employees left petitioner's employ prior to the refusal to bargain (R. 60).

longer desired it to represent them for purposes of collective bargaining (R. 61; P. A. 22, 26, 27, 30, B. A. 28). However, the evidence shows, and the Board found, that while they dropped the union subsequent to Armstrong's discharge because they feared they would lose their jobs, they again, almost a year later, decided to make another try at securing collective bargaining through the Union but were again dissuaded because of fear "they would lose their jobs" (R. 61, 65–66, 67; B. A. 7–8, 23–26, 33, 38). Upon this evidence the Board held that "their defection cannot operate to change the status of the Union as the representative of a majority of the employees within the appropriate unit" and that the Union at all times since October 16, 1940, has been the exclusive representative of petitioner's employees (R. 61, 67).

The Board ordered petitioner to cease and desist from its unfair labor practices; upon request, to bargain collectively with the Union; to reinstate Armstrong with back pay; and to post appropriate notices (R. 71–73). Thereafter, the Board filed a petition for enforcement of its order in the court below (S. R. 1–4). On October 25, 1943, the court handed down its opinion enforcing the Board's order in full (S. R. 16–24). A petition for rehearing was denied on November 9, 1943 (S. R. 35), and on November 22, 1943, the court entered its enforcement decree (S. R. 35–37).

ARGUMENT

The petition for certiorari is largely devoted (Pet. 1–6, 9–15) to an attack upon the Board's findings as not supported by substantial evidence. In its statement of the facts (Pet. 9, 24) petitioner omits most of the important evidentiary findings upon which the Board based its ultimate determination that petitioner had engaged in unfair labor practices. The findings of the Board, set forth in our Statement, are amply supported by the evidence we have cited (*supra*, pp. 3–7), as the court below, after review and analysis of the record, held. No question of importance is presented by petitioner's contention that the Board's findings are not supported by substantial evidence, and further review by this Court is not warranted.

Petitioner's contention (Pet. 13–14) that it did not fail in its bargaining obligation because the Union never submitted proof of its majority is without merit. Petitioner made no inquiry as to whether the Union represented a majority of its employees at the time of the request for negotiations, and it did not base its refusal to negotiate upon any claim of lack of majority in the Union. Since the Union, as the Board found (R. 61), had been designated by a majority of the employees in an appropriate unit at the time it requested negotiations, petitioner could not excuse its refusal to bargain by urging before the

Board asserted doubts as to the majority, which had not been the real reason for its refusal to bargain.[5]

Petitioner also contends (Pet. 15–16) that the Board's order requiring it, upon request, to bargain collectively with the Union should not be enforced, because the Union, due to a change in the sentiment of some of its employees, had lost its majority at the time of the hearing. But the Board found (R. 61, 67), on ample evidence (*supra*, p. 7), that the defections from the Union were not the free choice of the employees but solely the result of their fear of petitioner's anti-union conduct. Hence, the defections did not operate to alter the status of the Union as the statutory representative (R. 61, 67). The employees who designated the Union still constitute a majority of the unit, and, therefore, petitioner must fulfill its bargaining obligation. The case thus differs in material respects from *Franks Bros. Company* v. *National Labor Relations*

[5] *National Labor Relations Board* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 254 (C. C. A. 8); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 436 (C. C. A. 7); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756, 757 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2), certiorari denied, 304 U. S. 576.

Board, No. 521, this Term, certiorari granted January 10, 1944, and is clearly governed by the Court's decision in *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 340.

CONCLUSION

The decision below, sustaining the Board's order, is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
IRENE R. SHRIBER,
Attorneys,
National Labor Relations Board.

JANUARY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449 (U. S. C., title 29, secs. 151 *et seq.*)) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

SEC. 10. * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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